Petition

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In The

Supreme Court of the United States

October Term, 1981

LUDWIG BRUSCHI,
DR. AUGUST B. JULIANO,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. Does each credit transaction with a federally-insured bank involve at most only one violation of 18 U.S.C. § 1014 -- no matter how many false statements have been made -- as the First Circuit holds; or does each false statement in a credit application constitute a separate violation of § 1014, as the Third Circuit holds?

2. Did the Third Circuit act in derogation of this Court's Gypsum decision, and impermissibly reduce the prosecution's burden of proof so as to permit findings of guilt based on respondeat superior, when it approved use of a "reckless indifference" formulation in jury charges on the mental elements of conspiracy and fraud?

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IN THE SUPREME COURT OF THE UNITED STATES

LUDWIG BRUSCHI and DR. AUGUST B. JULIANO,
Petitioners,

- versus -

UNITED STATES OF AMERICA, Respondent.*

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Ludwig Bruschi and Dr. August B. Juliano hereby petition that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment at Numbers 80-2534 and 80-2535.

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* In addition to petitioners, who were members of a partnership named "Vista View," the grand jury also indicted the partnership's attorney, Thomas DiBiasi, whose case was severed. After petitioners had been convicted, Mr. DiBiasi negotiated a plea to a misdemeanor violation of 18 U.S.C. § 656 (bank embezzlement). He received a non-custodial sentence and has taken no appeal.

OPINIONS BELOW

The opinion of the court of appeals, which has not yet been reported, was filed on July 28, 1981. It is reproduced at 8a. The district court's unreported opinions rejecting petitioners' claims of multiplicity are reproduced at 45a, 46a.

JURISDICTION

Petitioners were each convicted on some of the nine counts in indictment No. 79-283 (9a) after trial by jury in the District of New Jersey. The jury was unable to reach verdicts on the remaining counts.

Mr. Bruschi was sentenced to concurrent three-year custodial terms. Dr. Juliano was sentenced to concurrent 18-month custodial terms and to six consecutive fines totalling $35,000. Both sentences have been stayed by the trial court pendente lite.

The judgment below (6a), affirming the convictions and sentences, was filed on July 28, 1981. Separate petitions for rehearing were denied on September 8, 1981 (2a, 4a).

An order (1a) was entered on October 29, 1981, by Mr. Justice Brennan as Circuit Justice, extending the time within which to file this Petition up to and including December 7, 1981.

This Court's certiorari jurisdiction is established by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The issues presented call upon this Court to construe 18 U.S.C. § 1014 (false statements to procure loans from federally insured banks) in light of the Due Process and Double Jeopardy clauses of the Fifth Amendment to the United States Constitution. The texts of those authorities are reproduced at 61-62a.

INTRODUCTORY STATEMENT

The court below has countenanced the importation of *respondeat superior* into the law of felony. No case prior to the one at bar has held the principals in a business venture liable at felony merely for showing indifference -- even reckless indifference -- to the possibility that their agents, without solicitation, had engaged in fraud.

If the jurisprudence of the Third Circuit is not checked, all participants in every commercial venture will have a judicially-created duty to investigate the truth of the contents of every routine business document they sign. Those who rely upon the honesty of an attorney, an accountant or an underling can be branded felons if their reliance has been misplaced.

That view of the law cannot be reconciled with this Court's decisions. And it is completely alien to the common understandings and practices in the world of business.

STATEMENT OF THE CASE

"Vista View" was a partnership formed to construct and operate a three-story office building in Union City, New Jersey. Construction was initiated with funds obtained without impropriety from Garden State National Bank. That bank leased the building's ground floor.

A. Because of substantial cost overruns, the partnership made application to Lincoln Federal Savings and Loan Association (hereinafter, "Lincoln") for a mortgage. Included within the application was a lease for third floor space to M. David Isaak, D.D.S., trading as Dental Associates. Dr. Isaak's signature had been forged to that lease. Three related documents submitted to Lincoln contained statements which were false only because that lease was bogus.

The grand jury charged four separate violations of 18 U.S.C. § 1014 in connection

with the Lincoln mortgage application, one for each of the documents just described.[1]

That application was approved, and the Lincoln mortgage closed on February 22, 1977. The bulk of the proceeds were used to pay off Vista View's original mortgage.

B. Faced with continuing financial difficulties, the partnership submitted a mortgage application to Columbia Savings and Loan Association (hereinafter, "Columbia"). Included in that application were forged revisions of the Dental Associates lease and of a valid lease of third floor space to an optometrist, Dr. Robert N. Peterson.

Four counts of the indictment charged

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1. Count Two charged that the Dental Associates lease was forged (29a). Count Three charged that projected rent receipts had been overstated because that lease was bogus (31a). Count Four charged that a letter written by Vista View attorney Thomas DiBiasi falsely stated that the Dental Associates lease existed (33a). Count Five charged that a document signed by Dr. Juliano, which subordinated the rents from Dental Associates to the mortgage, was false because there would be no such rents (35a).

separate § 1014 violations in connection with the Columbia mortgage application.[2]

Columbia approved the application, and the mortgage closed on January 12, 1978. The bulk of the proceeds were used to discharge the Lincoln mortgage.

C. The grand jury also charged a conspiracy to violate § 1014 by submitting false statements to Lincoln and Columbia (19a). There was no independent proof of petitioners' participation in any such conspiracy.

D. Dr. Juliano had been one of Vista View's five founding partners. Mr. Bruschi joined Vista View after the Lincoln mortgage closed. Both were partners when application was made for the Columbia mortgage.

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2. Count Six charged that the revised Dental Associates lease was forged (37a). Count Seven charged that the revised Peterson lease was forged (39a). Count Eight charged that projected rent receipts had been overstated because those leases were bogus (41a). Count Nine charged that an assignment of the rents to Columbia was false because the forged leases would not yield the stated rents (43a).

The prosecution acknowledged that neither Mr. Bruschi nor Dr. Juliano forged any of the leases.[3] It offered no proof that either

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3. There was no uncertainty as to who forged the revised leases that went to Columbia. Star witness Basil Pinnese, the partnership's accountant, testified that he took it upon himself to do so, expecting to receive $21,000 (i.e., one percent of the proceeds) if the mortgage were approved.

The record does not establish the identity of the person who forged the original Dental Associates lease that went to Lincoln. Pinnese testified that Vista View attorney DiBiasi claimed credit for that forgery. This testimony was rank hearsay, because DiBiasi's out-of-court admission was made after any conspiracy had attained its goal. The court of appeals held that the jury's consideration of this hearsay was harmless (15a).

While Pinnese had been clear and unequivocal in his condemnation of attorney DiBiasi, his testimony simply did not nail petitioners to the wall. On the contrary, he was vague and non-specific on the crucial issue of whether petitioners actually knew about any forgery. Assuming that the jury believed every word of Pinnese's testimony, only by resort to sheer speculation could they infer from it the dispositive events which Pinnese had pointedly omitted from his testimony, namely, that petitioners had been informed of the forgeries. Cf. United States v. Di Re, 332 U.S. 581, 593-94 (1948) (informant's silence must be construed adversely to prosecution).

petitioner had solicited any forgery, or even had timely learned about the forgeries.

On the fundamental question of whether petitioners actually knew that any lease had been forged, the government's proofs were all but non-existent. Circumstances were developed which might have alerted a suspicous person to the forgeries, but these circumstances would not have brought the forgeries home to a reasonably trusting person.[4]

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4. There were four circumstances upon which the government placed reliance. Each of these was so attenuated that even when taken in the aggregate they do not meet this Court's unvarying requirement that circumstantial proof of knowledge and intent must be "clear, not equivocal." Ingram v. United States, 360 U.S. 672, 680 (1959); United States v. Direct Sales Co., 319 U.S. 705, 711 (1943).

First, Dr. Juliano was the nominal managing partner in Vista View. This fact was offered to support a theory based on the doctrine of respondeat superior: Since Dr. Juliano had signed leases (and other documents) on behalf of the partnership, he should be charged with knowledge as to the validity of each lease.

Second, Dr. Isaak had negotiated a profit sharing agreement under which he would pay no rent for his dental office on the

[continued on next page]

E. Over defense objections (55a), the jury was charged that the requisite knowledge and intent on "each count" can be inferred

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[Note 4, continued]

second floor. This fact was offered to show that Dr. Juliano should have known that Isaak never agreed to pay rent for laboratory space on the third floor, and therefore had not signed the lease. The inference of knowledge is unwarranted because Dr. Isaak, testifying for the prosecution, admitted he had expressed interest in renting laboratory space on Vista View's third floor. Isaak never thereafter notified the partnership that he would not lease third floor space.

Third, both petitioners knew that the third floor was not ready for occupancy, and therefore had not yet produced income. This fact simply has no bearing upon whether the leases were genuine. Moreover, Vista View shared knowledge of this fact with Columbia. The primary purpose of the refinancing was to obtain money with which to complete construction of the building so that tenants could take occupancy, and Columbia withheld some of the mortgage proceeds pending completion of the third floor.

Finally, at partnership meetings during the months preceding submission of the Columbia mortgage application, there was talk about seeking new tenants. The prosecution viewed this as proof that petitioners knew there was no valid lease with Dental Associates. Nothing said at those meetings evidenced knowledge that the

[continued on next page]

from "reckless indifference as to whether [statements] are true or false" (58a). Petitioners maintained that recklessness had nothing to do with bank fraud or conspiracy; that the crucial jury issue was whether the defendants "actually knew" of the forgeries, for without that knowledge they would not

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[Note 4, continued]

Dental Associates lease was forged. On the contrary, the expressed concern was that existing leases would not be honored because of Vista View's inability to attract business for its tenants.

The original Vista View concept had been to provide comprehensive health services to members of a prepaid medical plan. All concerned -- bankers, partners, and tenants -- knew this. Negotiations were conducted with such a plan, but the matter was still up in the air when the second floor went into operation during the summer of 1977. In short order, both Dr. Isaak and Dr. Peterson had complained that management was not attracting an adequate number of patients. In light of those complaints, there was an obvious danger that the existing leases would not be honored. By their terms, the discussions to which the government pointed were occasioned by the increasing likelihood that tenants would break their leases, and not by any awareness that space had not in fact been rented.

know of any false statements and they could not conspire[5] (52a).

F. Evidently, the jury deemed an accused's signature on a questioned document -- rather than his knowledge of the document's false contents coupled with an intent to mislead the bank -- to be the sine qua non of guilt. Each petitioner was found guilty on any given § 1014 count only when the document at issue bore his signature.

Dr. Juliano was convicted on two of the substantive Lincoln counts and three of the Columbia counts. Mr. Bruschi was convicted on one of the Columbia § 1014 counts. Both petitioners were found guilty of conspiracy,

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5. The proofs that petitioners acted without great caution were undisputed: Dr. Juliano had signed documents without reading them and by telephone had authorized Vista View's accountant, Pinnese, to affix his (Juliano's) signature to the revised leases that were submitted to Columbia; Mr. Bruschi had specifically deferred to the judgment of Dr. Juliano and the partnership attorney, rather than independently investigating the facts.

apparently because each was deemed implicated in at least one substantive count.

The jury, which had deliberated for three days when it returned these partial verdicts, was discharged without resolving the remaining substantive counts.

G. On appeal, the Third Circuit held that there was no error in the instruction on "reckless indifference," because it "merely dealt with statements from which the jury could infer knowledge or intent" (14a).

The court of appeals further held that the fracturing of each mortgage application into four separate § 1014 counts was perfectly proper because the unit of prosecution under § 1014 is the false statement rather than the credit transaction (16a). The court therefore held that Dr. Juliano's sentence to consecutive fines on each count did not constitute double jeopardy (17a n.3).

Accordingly, the judgments of conviction and sentences were affirmed. This petition followed.

REASONS FOR GRANTING CERTIORARI

1. THERE IS A DIRECT CONFLICT IN THE COURTS OF APPEALS ON AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION

The first question presented asks whether § 1014 is violated once, or more than once, by a single loan application containing several false statements. To answer questions of this type, as the Court stated in Sanabria v. United States, 437 U.S. 54, 69-70 (1978), the statutory "unit of prosecution" intended by Congress must be ascertained. This is often done on certiorari.[6]

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6. See, e.g., Castle v. United States, 368 U.S. 13 (1962) (per curiam) (transporting five forged money orders is one violation of 18 U.S.C. § 2314); Ladner v. United States, 358 U.S. 169 (1958) (one shotgun blast injured two officers; single violation of predecessor to 18 U.S.C. § 111); Bell v. United States, 349 U.S. 81 (1955) (single transportation of two women over state line is only one violation of 18 U.S.C. § 2421); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) (single course of conduct which violates F.L.S.A. duties to many employees is one criminal violation of 29 U.S.C. § 216). And compare Albernaz v.

[continued on next page]

A. Before and during their trial (47a, 48a), petitioners complained that the indictment was bad for multiplicity: The Lincoln mortgage application constituted at most one violation of § 1014, not the four separate violations spelled out in the indictment; likewise for the Columbia mortgage application. The district court rejected petitioners' contentions without explanation (45a, 46a). The district court later imposed five consecutive fines for the two Lincoln counts and the three Columbia counts on which Dr. Juliano was convicted.

On appeal, petitioners complained that the prolix pleading had a prejudicial impact on the jury, see, e.g., United States v. Ketchum, 320 F.2d 3, 8 (2d Cir. 1963); and

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[Note 6, continued]

United States, ___ U.S. ___, 101 S.Ct. 1137 (March 9, 1981) (Congress intended to punish separately conspiracy to import drugs and related conspiracy to distribute) with Braverman v. United States, 317 U.S. 49 (1942) (Congress intended to punish as one violation of 18 U.S.C. § 371 single agreement to violate more than one statute).

that Dr. Juliano's sentence to consecutive fines violated the Double Jeopardy clause.

The Third Circuit rejected these contentions (16a-17a & n.3), holding (16a):

> [S]ection 1014's proscription against knowingly making "any false statement or report" (emphasis added) indicates that Congress intended to treat each such misrepresentation separately, and did not intend that all such statements or reports concerning a single transaction must be a single crime.

B. In United States v. Canas, 595 F.2d 73 (1st Cir. 1979), the First Circuit clearly and unequivocally rejected a contention that each false statement constitutes a separate violation of § 1014. The First Circuit reasoned that Congress sought to protect federally-insured banks from being fraudulently induced to part with their assets; hence the focus of the statute -- and the unit of prosecution -- must be the credit transaction.

Specifically -- and at the urging of the government -- the Canas Court held (595 F.2d at 78):

> [E]ach document was a necessary part of the loan application and each was required before the Bank would make the loan. In other words, the documents were interrelated and in the absence of any one of them, the "false statement or report" was incomplete.

That holding is fully applicable to the facts at bar. All four challenged documents submitted to Lincoln were interrelated, and in the absence of any one of them the application was incomplete. The same holds true for the Columbia mortgage application.

The First Circuit therefore would have accepted petitioners' claim of multiplicity, whereas the Third Circuit has rejected it. Accordingly, there is a direct conflict in the circuit courts of appeals as to the unit of prosecution in § 1014 cases.

C. Two other circuits have addressed this question. Each, when confronted with multiple § 1014 counts based on a single document, eschewed the analysis adopted by the Third Circuit.

In United States v. Sahley, 526 F.2d 913 (5th Cir. 1976), seven false averments which had been contained in a single financial statement were each prosecuted as separate § 1014 violations. Sahley was convicted on three counts: falsely denying involvement in litigation, falsely claiming a $640,000 interest in a country club, and falsely identifying himself as "William George" (526 F.2d at 914-15).

The Fifth Circuit was fully satisfied as to Sahley's guilt, but it held that Sahley's course of conduct constituted only one § 1014 offense. Adopting the approach to statutory construction commanded by Bell v. United States, 349 U.S. 81 (1955), the Sahley Court held (526 F.2d at 918):

> A single offense may be punished but once. Sahley, although convicted of making three false assertions, made them on but a single document, submitted to acquire a single loan . . .
>
> The statute in this instance speaks of "statement" and "report" in a manner which will not support a fracturing of the offense according to the number of false allegations in a single financial statement.

In United States v. Sue, 586 F.2d 70 (8th Cir. 1978), two counts of the indictment "charged Sue with making false statements in different paragraphs of a single security agreement" (586 F.2d at 71). The Eighth Circuit followed Sahley, holding that those two counts were bad for multiplicity; they both charged the same § 1014 offense.

D. Arguably, Sahley and Sue might be reconciled with the decision below because in those cases, all of the false statements were contained in a single document. Canas, however, which adopted the same approach to statutory construction as Sahley and Sue, simply cannot be harmonized with the decision in petitioners' case.

In Canas, as in the case at bar, some of the false statements were submitted to the bank on different documents and on different dates. The First Circuit held that only one § 1014 offense could spring from a single credit transaction. The Third Circuit has resolutely rejected that holding.

E. This irreconcilable conflict in the circuits, involving the construction of a frequently-invoked federal statute, is of constitutional dimension. The correct drafting of an indictment, the fairness of trial proceedings, and the double jeopardy limitations on sentencing authority,[7] all turn on whether the unit of prosecution in § 1014 cases is the credit transaction or each false assertion contained in the credit application. This Court's resolution of the first question presented is therefore warranted.

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7. By specifically reaching and rejecting Dr. Juliano's double jeopardy claim (17a n.3), the Third Circuit has foreclosed any possibility of a post-conviction remedy in circumstances where the First Circuit would find double jeopardy.

2. THE THIRD CIRCUIT'S APPROVAL OF AN INSTRUCTION WHICH MADE RECKLESS INDIFFERENCE TO A STATEMENT'S TRUTH OR FALSITY THE MEASURE OF KNOWING MISCONDUCT VIOLATES THIS COURT'S HOLDINGS ON THE MENTAL ELEMENT IN FELONY CASES, REDUCES THE GOVERNMENT'S BURDEN OF PROOF, AND RADICALLY DEPARTS FROM THE UNIFORM PRACTICE IN § 1014 CASES

Although the concept of recklessness -- gross negligence -- plays a major role in the litigation of civil actions and of petty regulatory offenses, its role in the law of felony has always been narrowly circumscribed. In the absence of a contrary legislative mandate (e.g., reckless endangerment statutes), the mental element in felony cases is satisfied by reckless conduct only when the actor labors under a fiduciary duty.[8] See, e.g., United States v. Squires, 440 F.2d 859, 863 (2d Cir. 1971).

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8. Note 8 is printed on next page.

Section § 1014 imposes no fiduciary obligation upon a bank's customer. That accounts for the circuit courts' uniform holdings that in § 1014 cases, the prosecution must prove actual knowledge of a statement's falsity, and not just failure to ascertain its truth. See United States v. Norberg, 612 F.2d 1 (1st Cir. 1979); United States v. Erskine, 588 F.2d 721 (9th Cir. 1978); United States v. Cleary, 565 F.2d 43 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978); United States v. Lentz, 524 F.2d 69 (5th Cir. 1975). That same mental state must be shown to establish membership in a conspiracy to violate § 1014.

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8. Recklessness, as used herein, does not subsume studied or pretended ignorance. Where the actor knowingly gives false data to an agent with the intention that it be submitted to a bank, failure to review the agent's work product will not insulate the principal from liability. United States v. Goberman, 458 F.2d 226 (3d Cir. 1972).

In the case at bar, the government has never contended that Dr. Juliano or Mr. Bruschi deliberately closed their eyes to what otherwise would have been obvious. There is no evidence whatsoever to support an hypothesis of feigned ignorance.

See United States v. Feola, 420 U.S. 671 (1975).

A. The Third Circuit first disavowed deciding whether the government need only prove recklessness in a § 1014 prosecution, and then held that "reckless indifference could be evidence of knowledge or intent" (14a). On that doubtful proposition it approved the district court's instruction that proof of petitioners' recklessness -- which the jury evidently found in petitioners' casual signing of routine documents prepared under the direction of Vista View's attorney -- evidenced at law their knowledge of the falsity of statements contained in the documents they signed.

Notwithstanding its assertedly narrow ruling, the court below specifically adopted and approved the proposition that recklessness is pertinent to guilt or innocence in § 1014 cases. Hereafter, trial judges in the Third Circuit will be free to use the reck-

lessness charge given to petitioners' jury in § 1014 cases and presumably in all cases involving the multitude of statutes which condemn "knowing" conduct.

B. The role of recklessness in crimes of knowledge was considered and settled in United States v. United States Gypsum Co., 438 U.S. 422, 442-46 (1978). In any prosecution where knowledge must be proven, the Gypsum Court flatly stated, "the concepts of recklessness and negligence have no place" (438 U.S. at 444). Cf. United States v. Park, 421 U.S. 658, 671-73 (1975) (Federal Food, Drug and Cosmetic Act specifies negligence as the mental element); Morissette v. United States, 342 U.S. 246 (1952) (where statute does not specify mental element, it will be construed to condemn only knowing conduct undertaken with evil purpose).

Congress has clearly decided that knowledge must be proven in § 1014 cases. It adopted as the statutory language, "Whoever

knowingly makes any false statement or report . . .". Gypsum therefore teaches that the concept of recklessness simply "ha[d] no place" in the charge to petitioners' jury.

C. The decision below cannot be understood to flow from another line of cases, for the panel cited to none. Counsel's research has not revealed a single reported decision holding that recklessness satisfies § 1014's requirement that a statement or report be "knowingly" false. None of the recklessness cases cited in the government's request to charge (50a n.1), or in its Brief below, involved § 1014.

Put bluntly, the district court's reckless indifference instruction would have been commonplace in a libel or slander suit, but it was an unprecedented departure from the uniform practice in prior § 1014 prosecutions of requiring the government to prove actual knowledge of falsity.[9]

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9. Note 9 is printed on next page.

D. The Third Circuit's attempt (14a) to distinguish recklessness as "evidence" of guilt from recklessness as the mental element of § 1014 crimes is disingenuous. It matters not whether a trial judge states that the government must merely prove recklessness, or states that the jury may infer from reckless indifference the requisite knowledge and purpose. Under either formulation, the jury need not focus on actual knowledge and intent to mislead; a finding of gross negligence will yield verdicts of guilt.

To hold that recklessness is probative of actual knowledge, as the Third Circuit held, is to deprive words of their usual meanings. Neither simple logic nor the most erudite of dictionaries will lend support to

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9. In the court below, petitioners placed primary reliance on United States v. Glantzman, 447 F.2d 199 (3d Cir. 1971) (18 U.S.C. § 1001). The panel made no attempt to distinguish that precedent. In Glantzman, respondeat superior was rejected as a basis for imputing knowledge of an underling's crimes. There, as here, the falsity of the statements was "not apparent on the face" of the documents (447 F.2d at 201).

the view that a reckless actor -- one who signs documents without reading them or without investigating their every detail -- actually knows that the signed statements are false, or actually intends to mislead.

By definition, recklessness precludes the actor from acquiring knowledge as to the true state of affairs.[10] Absent such knowledge, the purpose or intent condemned by the statute could not exist. Hence, and contrary to the court of appeals' unexplained holding, neither aspect of the mental element in § 1014 crimes -- knowledge of falsity, intent to mislead -- flows from reckless conduct.

E. This Court has repeatedly condemned practices which have the practical effect of diminishing the government's constitutional burden of proof in criminal causes. Jackson

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10. Although the district court charged the jury that guilt is not incurred "because of mistake or accident or other innocent reason" (58a), it refused to charge that "ignorance of the true state of affairs" -- the essence of petitioners' defense -- would be an innocent reason mandating acquittals (55a).

v. Virginia, 443 U.S. 307 (1979)(substantial evidence); Mullaney v. Wilbur, 421 U.S. 684 (1975)(reasonable doubt); Ingram v. United States, 360 U.S. 672, 680 (1959) (circumstantial evidence of knowledge and intent must be "clear, not equivocal").

In petitioners' case, the reckless indifference instruction diminished the prosecution's statutory burden in violation of the Due Process clause. Moreover, the instruction on acquiescence (59a), which invited the jury to guess at whether petitioners were innocent bystanders or knowing participants, and the instruction on agency (59-60a), which can be understood to impute vicarious liability for consenting to an agent's act (submitting a mortgage application) without knowing of the agent's misconduct (forgery), required "the jurors [to] make determinations of the crucial issue upon their own notion of what the law should be instead of what it is." Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).

Laboring under these flawed instructions, the jury condemned petitioners for guilt by association, for signing routine documents prepared by Vista View's agents -- as though criminal liability, like civil liability, can be imposed on the theory of respondeat superior.

Petitioners' guilt or innocence should have turned on whether they actually knew about the forgeries -- a proposition as to which the government's proofs were skimpy and highly ambiguous.[11] The jury was permitted to avoid making the crucial determination by looking instead to proofs of recklessness.

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11. The government never disputed petitioners' claim that its proofs did not meet the "clear, not equivocal" requirement of Ingram, supra. It argued in the court of appeals that "slight evidence" -- as distinct from slight participation proven by substantial evidence -- was sufficient to convict for conspiracy.

The trial judge was of the considered opinion that by indicting for conspiracy, the government reduces its burden (57a). With this diluted standard in mind, he ruled that the evidence against Mr. Bruschi was barely sufficient to go to the jury (Tr. 1672).

F. In the world of commerce, it is commonplace for executive and management personnel to sign without carefully reviewing documents prepared by attorneys, accountants, and underlings. If every such document had to be investigated at the highest level before signing, business would grind to a halt. Consequently, the economic risk that an agent has erred, and that the principal may be held civilly liable for such error, must be tolerated.

To impose criminal liability without notice on those who take a routine economic risk is simply unthinkable. Any such importation of respondeat superior into the law of felony would require the world of commerce to completely abandon its common understandings and practices. Instead of making major decisions, busy executives would get bogged down investigating minor factual details.

Petitioners face prolonged jail terms precisely because they did not investigate

the factual details before signing seemingly routine documents prepared by others. Their convictions, affirmed below, stand as monuments to the proposition that a principal's liability for serious crimes can be imposed on account of the unsolicited misconduct of an agent.

G. Because the decision below is in derogation of the teachings of this Court on the crucial mental elements which distinguish guilt from innocence, because that decision radically departs from the uniform holdings of other circuits on what must be proven in § 1014 cases, and because that decision by judicial fiat imports the concept of respondeat superior into the law of felony, review by this Court of the second question presented is warranted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

FREDRIC J. GROSS
132 Kings Highway East
Haddonfield, NJ 08033

Attorney for Petitioners

December 7, 1981

Appendix

81-1081

No. 81-

Office - Supreme Court, U.S.
FILED
DEC 7, 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

LUDWIG BRUSCHI,
DR. AUGUST B. JULIANO,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX A

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. A-356

LUDWIG BRUSCHI AND AUGUST P. JULIANO,

Petitioners

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 6, 1981.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 29th

day of October, 1981

APPENDIX B

ORDER DENYING REHEARING TO MR. BRUSCHI
DATED SEPTEMBER 8, 1981

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-2535

UNITED STATES OF AMERICA

V.

LUDWIG BRUSCHI,

Appellant

(Crim. No. 79-00283-03 - D.N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular

active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

Dated: September 8, 1981

APPENDIX C

ORDER DENYING REHEARING TO DR. JULIANO
DATED SEPTEMBER 8, 1981

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-2534

UNITED STATES OF AMERICA,

V.

AUGUST B. JULIANO

Dr. August B. Juliano, Appellant

(Cri. No. 79-00283-01 - D.N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALIDSERT, ADAMS, GIBBONS, HUNTER WEIS, GARTH, HIGGINBOTHAM, SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

APPENDIX C

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

Dated: September 8, 1981

APPENDIX D

JUDGMENT OF COURT OF APPEALS
DATED JULY 28, 1981

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 80-2534/35

UNITED STATES OF AMERICA

V.

JULIANO, AUGUST B.

DR. AUGUST B. JULIANO,

Appellant

(D. C. Crim. 79-00283-01)

UNITED STATES OF AMERICA

V.

BRUSCHI, LUDWIG,

Appellant

(D. C. Crim. No. 79-00283-03)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ---- DISTRICT OF NEW JERSEY

Present: SEITZ, Chief Judge; VAN DUSEN and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

These causes came on to be heard on the record from the United States District

APPENDIX D

Court for the District of New Jersey and were argued by counsel on July 14, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered September 12, 1980, be, and the same are hereby affirmed.

ATTEST:

s/ S. Mrvos
Clerk

July 28, 1981

APPENDIX E

OPINION OF COURT OF APPEALS,
FILED JULY 28. 1981

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-2534

UNITED STATES OF AMERICA

V.

JULIANO, AUGUST B.

DR. AUGUST B. JULIANO,

Appellant

(D. C. Crim. No. 79-00283-01)

No. 80-2535

UNITED STATES OF AMERICA

V.

BRUSCHI, LUDWIG,

Appellant

(D. C. Crim. No. 79-00283-03)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

Argued July 14, 1981

APPENDIX E

Before SEITZ, Chief Judge, and VAN DUSEN and HIGGINBOTHAM, Circuit Judges

(Opinion filed July 28, 1981)

Fredric J. Gross, Esq. (ARGUED)
Haddonfield, New Jersey,
Attorney for Appellant Juliano

Donald R. Conway, Esq. (ARGUED)
Harry G. Carroll, Esq.,
of Counsel
Hackensack, New Jersey,
Attorney for Appellant Bruschi

William W. Robertson, Esq.,
United States Attorney;
Maryanne Trump Desmond, Esq.,
Assistant U.S. Attorney;
Samuel Rosenthal, Esq. (ARGUED)
Assistant U.S. Attorney;
Newark, New Jersey,
Attorney for Appellee

APPENDIX E

OPINION OF THE COURT

PER CURIAM:

Defendants August B. Juliano and Ludwig Bruschi appeal from their convictions for violating 18 U.S.C. §§ 371 and 1014 (1976). The indictment charged that defendants conspired to make materially false statements to federally-insured savings and loan associations. Defendants' appeals challenge the jury instructions, the sufficiency of the evidence, and the admission of alleged hearsay statements. Defendants also claim that the indictment improperly contained multiple counts and raise various other claims of error. We will affirm.

Defendants argue that the trial judge improperly charged the jury that it could convict if they acted with "reckless indifference." We do not read the charge to say this. The relevant portion of the charge states:

APPENDIX E

Now, each count of the indictment charges, and the government must prove, that each defendant knowingly and willfully violated the law.

Knowingly means with knowledge, that is voluntarily and intentionally and not because of mistake or accident or other innocent reason.

An act is done willfully if done voluntarily and intentionally with specific intent to [do] something the law forbids, that is to say, with bad purpose either to disobey or disregard the law.

Willful intent maybe [sic] evidenced, not only by statements that are patently false, but by false and untrue statements made with reckless indifference as to whether they are true or false.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence and to determine from all such facts and circumstances wheter the requisite knowledge and intent were present at the time of question. Direct proof is unnecessary. Knowledge and intent maybe [sic] inferred from all the surrounding circumstances.

APPENDIX E

Jury charge 157-58 (June 6, 1980) (emphasis added). The charge stated that false statements made with reckless indifference as to their truth could be evidence of willful intent. The court repeatedly charged that, to convict, the jury must find that the defendants acted knowingly and willfully.[1]

---

1. "Count one of the Indictment charges that from in and around October 1976 until at least January 12, 1978, the defendants knowingly and willfully engaged in a conspiracy . . ."
Id. at 160.

"I have already defined the requirements necessary to establish knowing and willful conduct."
Id. at 166.

"Counts two, three, four and five charge the defendant, Juliano, with knowingly and willfully making false statements . . . .

"Counts six, seven, eight and nine charge the defendants, Juliano and Bruschi, with knowingly and willfully making false statements . . . ."
Id. at 171.

"There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law.

"First, that the defendant knowingly made a false statement or report . . . .

APPENDIX E

The final sentence of the passage quoted

"Second, that the defendant made the false statement or report willfully and with intent to influence the action of the Federal Savings and Loan Association . . . " Id. at 172.

"The essence of the offense is knowingly and willfully making a false statement in an attempt to influence the action of the bank.

"A statement is false or fictitious if untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is fraudulent if known to be untrue or made or caused to be made with the intent to deceive the Federal Savings and Loan Association to whom submitted.

"The word, false, must be considered together with the words, knowingly and willfully. An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law. The word, knowingly, is added in order to insure that no one would be convicted [who] made or caused to be made a statement or representation which was false because of mistake or accident or other innocent reason.

"If you find that a defendant did not knowingly and willfully make and use false writings and documents or cause any to be made or used, you should acquit that defendant.

. . .

"The gist of the offense is an attempt to influence such an institution by knowingly and willfully making a false statement or report concerning material facts."
Id. at 175-76.

demonstrates that the language "reckless indifference" dealt with statements from which the jury could infer knowledge or intent. Nothing in the charge suggests that the jury could convict if it found that defendants had acted with reckless indifference but not with knowledge or intent. We hold that charging the jury that false statements made with reckless indifference could be evidence of knowledge or intent was not reversible error. On this record, we need not, and do not, decide whether a charge that defendants need only have acted with reckless indifference for the jury to convict would be improper.

Defendants also contend that the evidence was insufficient to show that they knew the statements in the documents submitted to the savings and loan associations were false. We hold that the evidence was sufficient to support the jury verdict. See, e.g., Tr. 405, 942, 1009-10, 1014-15, 1022, 1026-27, 1029-30, 1034, 1046-47, 1050-51. Questions of credibility of witnesses,

such as Basil Pinnese (the Government's principal witness), were for the jury.

Defendants argue that the district court erred by admitting into evidence Thomas DiBiasi's statement to Pennise, that DiBiasi had forged a signature on a lease.[2] Defendants contend that this statement was not admissible under the co-conspirator exception to the hearsay rule, see Federal Rule of Evidence 801(d)(2)(E), because DiBiasi made it after the conspiracy had ended. We believe, however, that even if the district court erred in admitting DiBiasi's statement, such error was harmless under Federal Rule of Criminal Procedure 52(a). We also reject defendants' challenges to other alleged hearsay testimony. See Government of Virgin Islands v. Dowling, 633 F.2d 660, 664-65 (3d Cir. 1980), cert. denied, 49 U.S.L.W. 3333 (Nov.

---

2. See, e.g., Tr. 1028-29.

3, 1980); United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Trowery, 542 F.2d 623 (3d. Cir. 1976), cert. denied, 429 U.S. 1104 (1977); United States v. Bey, 437 F.2d 188 (3d Cir. 1971).

Defendants claim that the indictment contained multiple counts charging a single offense. They contend that, no matter how many fraudulent documents are submitted to a bank, only a single crime is committed if all the documents relate to one loan application. However, section 1014's proscription against knowingly making "any false statement or report" (emphasis added) indicates that Congress intended to treat each such misrepresentation separately, and did not intend that all such statements or reports concerning a single transaction must be a single crime. Thus, we hold that the Government could properly charge the defendants in a separate count for each fraudulent document. We need not decide here

whether the Government may, if it chooses, cover all the false statements in a single count of the indictment.

We have carefully considered all of defendants' other contentions made in their briefs and at oral argument[3] and have deter-

---

3. Defendants' other contentions include the following:

(a) absent certain allegedly inadmissible hearsay evidence, the evidence was insufficient to convict;

(b) the court should have required establishment of a conspiracy involving defendants before admitting co-conspirators' statements, and should have made more explicit findings about such a conspiracy prior to admitting this testimony;

(c) the court erred in refusing to order a bill of particulars identifying all the alleged co-conspirators (see, for example, point III of Juliano's brief);

(d) the court improperly relied on the agency hearsay exception and also created a "party" exception;

(e) the court improperly admitted testimony and documents which were hearsay or collateral to the case;

(f) the evidence presented to the grand jury was insufficient to sustain the indictment;

(g) the court erred in denying Bruschi's motion for severance; and

(h) the sentence to consecutive fines violates the Double Jeopardy Clause of the Fifth Amendment.

mined that they are without merit. The judgment of the district court will be affirmed.

APPENDIX F
INDICTMENT

UNITED STATES OF AMERICA	:	UNITED STATES DISTRICT COURT
V.	:	DISTRICT OF NEW JERSEY
AUGUST B. JULIANO THOMAS S. DI BIASI and LUDWIG BRUSCHI	:	Criminal No. 79-283 18 U.S.C. §§ 371, 1014 & 2

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges that:

COUNT 1

1. At all times stated herein, Lincoln Federal Savings and Loan Association, Westfield, New Jersey was a savings and loan association, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation.

2. At all times stated herein, Columbia Savings and Loan Association, Fair Lawn, New Jersey was a savings and loan association, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation.

3. At all times stated herein, Vista

View, a New Jesey partnership, owned a three-story office building located at 2201 Bergenline Avenue, Union City, New Jersey.

4. At all times stated herein, the defendant AUGUST B. JULIANO was a partner in Vista View.

5. At all times stated herein, the defendant LUDWIG BRUSCHI was a partner in Vista View.

6. At all times stated herein, the defendant THOMAS S. DI BIASI was an attorney admitted to practice law in the State of New Jersey, maintaining law offices in Nutley, New Jersey.

7. From in and around October, 1976, until at least January 12, 1978, at Westfield, Union City and at Fair Lawn in the District of New Jersey and elsewhere, the defendants,

AUGUST B. JULIANO
THOMAS S. DI BIASI and
LUDWIG BRUSCHI

did knowingly and willfully conspire, combine, confederate and agree with each other

and with others, to commit offenses against the United States, that is, to make and cause to be made materially false statements, and to overvalue property and securities submitted to the Lincoln Federal Savings and Loan Association and the Columbia Savings and Loan Association, the deposits of both banks being insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said banks in granting loans to Vista View, in violation of Title 18 United States Code, Section 1014 and 2.

8. It was a part of said conspiracy that the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI would present and cause to be presented to the Lincoln Federal Savings and Loan Association the following documents, for the purpose of influencing said bank to grant a loan to Vista View:

a) A lease, which represented that commencing January 1, 1977, Vista View, as landlord, leased to Dental

APPENDIX F

Associates, as tenant, 11,000 square feet of the third floor of the Vista View building located at 2201 Bergenline Avenue, Union City, New Jersey, for a term of 5 years at rental of $90,750.00 per year net-net, at a rate of $8.25 per square foot net-net.

b) A statement of Vista View's Cash Receipts and Disbursements and a schedule of Vista View's tenants.

c) A letter stating that the lease between Vista View and Dental Associates was still in existence.

d) A subordination Agreement whereby Vista View and Dental Associates subordinated a lease to a mortgage which was to be extended by Lincoln Federal Savings and Loan Association.

e) An Assignment of Rents.

9. It was a further part of said conspiracy that the defendants would present and cause to be presented to the Columbia

APPENDIX F

Savings and Loan Association, the following documents, for the purpose of influencing said bank to grant a loan to Vista View:

a) A lease, which represented that commencing January 1, 1977, Vista View, as landlord, leased to Dental Associates, as tenant, 11,000 square feet of the third floor of the Vista View building located at 2201 Bergenline Avenue, Union City, New Jersey, for a term of 10 years at rental of $110,000.00 per year net-net, at a rate of $10.00 per square foot net-net.

b) A lease, which represented that commencing January 1, 1977, Vista View, as landlord, leased to Robert N. Peterson, as tenant, 4,000 square feet of the third floor of the Vista View building located at 2201 Bergenline Avenue, Union City, New Jersey, for a term of 10 years at rental of $40,000.00 per year net-net, at a rate of $10.00 per square foot net-net.

APPENDIX F

c) A statement of "ACTUAL INCOME", which represented that leases for the third level of Vista View produce $150,000.00 per year in actual income.

d) An "Assignment of Lessor's Interest in Lease" which represented that in the event of default, Vista View assigned its interest in the Dental Associates and Peterson leases.

10. It was a further part of said conspiracy that the defendants would perform the acts set forth in Paragraphs 8 and 9 and other acts in order to hide and conceal and cause to be hidden and concealed, the true financial position of Vista View so that: 1) Lincoln Federal Savings and Loan Association would authorize, issue and defer action on a loan of $1,700,000.00 to Vista View and 2) Columbia Savings and Loan Association would authorize, issue and defer action on a loan of $2,100,000.00 to Vista View.

APPENDIX F

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants committed the following overt acts:

1. On or about October 20, 1976, the defendant THOMAS DI BIASI prepared and witnessed a lease between Vista View and Dental Associates.

2. On or about October 20, 1976, the defendant AUGUST B. JULIANO signed a lease between Vista View and Dental Associates.

3. In or about December, 1976, the defendant LUDWIG BRUSCHI submitted and caused to be submitted a Schedule of Tenants to Lincoln Federal Savings and Loan Association.

4. On or about February 16, 1977, the defendant THOMAS S. DI BIASI prepared and caused to be submitted a letter to Lincoln Federal Savings and Loan Association.

5. On or about February 22, 1977, the defendant THOMAS S. DI BIASI prepared and caused to be submitted to Lincoln

APPENDIX F

Federal Savings and Loan Association a Subordination Agreement.

6. On or about February 22, 1977, defendant AUGUST B. JULIANO signed an Assignment of Rents.

7. On or about February 22, 1977, the defendant AUGUST B. JULIANO signed a Mortgage obligating Vista View to pay Lincoln Federal Savings and Loan Association $1,700,000.00.

8. In or about November, 1977, the defendant THOMAS S. DI BIASI met with a representative of the the Donald Zucker Company.

9. In or about November, 1977, the defendant THOMAS S. DI BIASI directed the preparation of the leases described in Paragraph 9(a) and (b).

10. In or about December, 1977, the defendants caused the leases described in Paragraph 9(a) and (b) to be submitted to the Columbia Savings and Loan Association.

11. On or about January 12, 1978, the defendant AUGUST B. JULIANO signed a Mortgage obligating Vista View to pay Columbia

APPENDIX F

Savings and Loan Association $2,100,000.00.

12. On or about January 12, 1978, the defendant AUGUST B. JULIANO signed a Promissory Note obligating Vista View to pay Columbia Savings and Loan Association $2,100,000.00.

13. On or about January 12, 1978, the defendant AUGUST B. JULIANO signed an "Assignment of Lessor's Interest in Lease."

14. On or about January 12, 1978, the defendant LUDWIG BRUSCHI signed a Mortgage obligating Vista View to pay Columbia Savings and Loan Association $2,100,000.00.

15. On or about January 12, 1978, the defendant LUDWIG BRUSCHI signed a Promissory Note obligating Vista View to pay Columbia Savings and Loan Association $2,100,000.00.

16. On or about January 12, 1978, the defendant LUDWIG BRUSCHI signed an "Assignment of Lessor's Interest in Lease."

17. On or about January 12, 1978, the defendant THOMAS S. DI BIASI prepared and witnessed a Mortgage between Vista View and

APPENDIX F

Columbia Savings and Loan Association.

18. On or about January 12, 1978, the defendant THOMAS S. DI BIASI witnessed a Promissory Note between Vista View and Columbia Savings and Loan Association.

19. On or about January 12, 1978, the defendant THOMAS S. DI BIASI closed a $2,100,000.00 loan from Columbia Savings and Loan Association to Vista View.

In violation of Title 18, United States Code, Section 371.

APPENDIX F

COUNT 2

1. Paragraphs 1, 3, 4 and 6 of Count 1 are hereby realleged and incorporated as though set forth in full herein.

2. On or about December, 1976, at Westfield, in the district of New Jersey, the defendants

AUGUST B. JULIANO and
THOMAS S. DI BIASI

did knowingly and wilfully make materially false statements in a document submitted to the Lincoln Federal Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $1,700,000.00 to Vista View in that the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI falsely represented that, Dental Associates, as tenant, had executed a five-year lease for the rental of 11,000 square feet on the third floor of 2201 Bergenline Avenue, Union

APPENDIX F

City, New Jersey, under which Dental Associates had agreed to pay Vista View, as landlord, rent at a rate of $8.25 per square foot net-net, for a total rental of $90,750.00 per year net-net, when as the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI then knew, Dental Associates had not executed such lease.

In violation of Title 18, United States Code, Section 1014 and 2.

APPENDIX F

COUNT 3

1. Paragraphs 1, 3, 4 and 6 of Count 1 are hereby realleged and incorporated as though set forth in full herein.

2. On or about December, 1976, at Westfield, in the District of New Jersey, the defendants

AUGUST B. JULIANO and
THOMAS S. DI BIASI

did knowingly and wilfully make materially false statements in a document submitted to the Lincoln Federal Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $1,700,000.00 to Vista View in that the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI falsely represented that Vista View, had total rent receipts of $295,500.00, when as the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI then knew, Vista View did not have total rent receipts of $295,500.00.

APPENDIX F

In violation of Title 18, United States Code, Sections 1014 and 2.

APPENDIX F

COUNT 4

1. Paragraphs 1, 3, 4 and 6 of Count 1 are hereby realleged and incorporated as though set forth in full herein.

2. On or about February 16, 1977, at Westfield, in the District of New Jersey, the defendants

AUGUST B. JULIANO and
THOMAS S. DI BIASI

did knowingly and wilfully make materially false statements in a document submitted to the Lincoln Federal Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $1,700,000.00 to Vista View in that the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI falsely represented that a lease dated October 20, 1976 between Vista View and Dental Associates was still in existence when as the defendants AUGUST B. JULIANO and THOMAS S.

APPENDIX F

DI BIASI then knew, Dental Associates had not entered into said lease with Vista View.

In violation of Title 18, United States Code, Sections 1014 and 2.

APPENDIX F

COUNT 5

1. Paragraphs 1, 3, 4 and 6 of Count 1 are hereby realleged and incorporated as though set forth in full herein.

2. On or about February 22, 1977, at Westfield, in the District of New Jersey, the defendants

AUGUST B. JULIANO and
THOMAS S. DI BIASI

did knowingly and wilfully make materially false statements in a document submitted to the Lincoln Federal Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $1,700,000.00 to Vista View in that the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI falsely represented that Dental Associates and Vista View had entered into a lease dated October 20, 1976, which both parties agreed to subordinate to a mortgage which was to be

APPENDIX F

extended to Vista View by Lincoln Federal Savings and Loan Association when as the defendants AUGUST B. JULIANO and THOMAS S. DI BIASI then knew, Dental Associates had not entered into said lease with Vista View.

In violation of Title 18, United States Code, Sections 1014 and 2.

APPENDIX F

COUNT 6

1. Paragraphs 2, through 6, are hereby realleged and incorporated as though set forth in full herein.

2. On or about December 2, 1977, at Fair Lawn, in the District of New Jersey, the defendants

AUGUST B. JULIANO
THOMAS S. DI BIASI and
LUDWIG BRUSCHI

did knowingly and wilfully make materially false statements in a document submitted to the Columbia Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $2,100,000.00 to Vista View in that the defendants falsely represented that Dental Associates, as tenant, had executed a 10-year lease for the rental of 11,000 square feet on the third floor of 2201 Bergenline Avenue, Union City, New Jersey under which Dental Associates had

APPENDIX F

agreed to pay Vista View, as landlord, rent at a rate of $10.00 per square foot net-net, for a total rental of $110,000.00 per year net-net, when as the defendants AUGUST B. JULIANO, THOMAS S. DI BIASI and LUDWIG BRUSCHI then knew, Dental Associates had not executed such lease.

In violation of Title 18, United States Code, Sections 1014 and 2.

APPENDIX F

COUNT 7

1. Paragraphs 2, through 6, are hereby realleged and incorporated as though set forth in full herein.

2. On or about December 2, 1977, at Fair Lawn, in the District of New Jersey, the defendants

AUGUST B. JULIANO
THOMAS S. DI BIASI and
LUDWIG BRUSCHI

did knowingly and wilfully make materially false statements in a document submitted to the Columbia Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $2,100,000.00 to Vista View in that the defendants falsely represented that Robert N. Peterson, as tenant, had executed a 10-year lease for the rental of 4,000 square feet on the third floor of 2201 Bergenline Avenue, Union City, New Jersey under which Robert N. Peterson had

APPENDIX F

agreed to pay Vista View, as landlord, rent at a rate of $10.00 per square foot net-net, for a total rental of $40,000.00 per year net-net, when as the defendants AUGUST B. JULIANO, THOMAS S. DI BIASI and LUDWIG BRUSCHI then knew, Robert N. Peterson had not executed such lease.

In violation of Title 18, United States Code, Sections 1014 and 2.

APPENDIX F

COUNT 8

1. Paragraphs 2, through 6, are hereby realleged and incorporated as though set forth in full herein.

2. In or about December, 1977, at Fair Lawn, in the District of New Jersey, the defendants

AUGUST B. JULIANO
THOMAS S. DI BIASI and
LUDWIG BRUSCHI

did knowingly and wilfully make materially false statements in a document submitted to the Columbia Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $2,100,000.00 to Vista View in that the defendants falsely represented that Vista View's "ACTUAL INCOME" totaled $331,750.00, when as the defendants, AUGUST B. JULIANO, THOMAS S. DI BIASI and LUDWIG BRUSCHI then knew, Vista View did not have "ACTUAL INCOME" totaling $331,750.00.

APPENDIX F

In violation of Title 18, United States Code Sections 1014 and 2.

APPENDIX F

COUNT 9

1. Paragraphs 2, through 6, are hereby realleged and incorporated as though set forth in full herein.

2. On or about January 12, 1978, at Fair Lawn, in the District of New Jersey, the defendants

AUGUST B. JULIANO
THOMAS S. DI BIASI and
LUDWIG BRUSCHI

did knowingly and wilfully make materially false statements in a document submitted to the Columbia Savings and Loan Association, the deposits of which were then and there insured by the Federal Savings and Loan Insurance Corporation, for the purpose of influencing the action of said bank in granting a loan of $2,100,000.00 to Vista View in that the defendants falsely represented that there were then in full force and effect a lease dated October 20, 1976 between Vista View and Dental Associates and a lease dated November 4, 1976 between Vista View and Robert N. Peterson, when as the

APPENDIX F

defendants AUGUST B. JULIANO, THOMAS S. DI BIASI and LUDWIG BRUSCHI then knew, said leases were not in full force and effect.

In violation of Title 18, United States Code, Sections 1014 and 2.

A TRUE BILL

_____

.FOREMAN

_____

ROBERT J. DEL TUFO
UNITED STATES ATTORNEY

APPENDIX G

EXCERPT FROM DISTRICT COURT OPINION, DECEMBER 18, 1979

The court has examined defendant Juliano's motion to dismiss various counts of the indictment as multiplicitous; a motion to dismiss on the ground that recordation of all Grand Jury proceedings was required; defendant DiBiasi's motion as to sufficiency of count 1; defendant DiBiasi's motion to dismiss because the indictment alleges two separate conspiracies; the motion to dismiss because of an alleged breach of the attorney/client privilege; defendant DiBiasi's request for permission to issue subpoenae duces tecum returnable prior to trial; and defendants' motion to permit defense counsel to depose one Basil Pennise. These motions are without merit and are denied without discussion.

APPENDIX H

DISTRICT COURT OPINION, APRIL 29, 1980

Defendant Juliano has made another of what seems to be an interminable number of motions. This motion is to compel the Government to elect on which Counts it is to go forward. The motion was rejected before and I do so again.

Denied. The Government will submit an order.

APPENDIX I

MOTION TO COMPEL ELECTION

PLEASE TAKE NOTICE that on Monday, May 12, 1980, at ten o'clock in the morning (or as soon thereafter as counsel can be heard), in the United States Courthouse, Newark, New Jersey, before the Hon. Clarkson S. Fisher, Dr. August Juliano, one of the defendants herein, by the undersigned attorney, will

MOVE FOR ENTRY OF AN ORDER DIRECTING THE PROSECUTION TO ELECT to go to trial on only one of the Lincoln Federal counts (counts 2, 3, 4 and 5), and on only one of the Columbia Savings counts (counts 6, 7, 8 and 9), and to dismiss the remaining substantive counts with prejudice, on grounds of multiplicity.

A supporting Brief is submitted herewith. No affidavit is needed because this motion raises a pure question of law.

APPENDIX J

RENEWAL OF MOTION TO ELECT

[Rule 30, Transcript 60:13-14]

MR. GROSS: For the record, can we also renew the Motion to Elect among the substantive counts?

APPENDIX K

PROSECUTION REQUEST TO CHARGE NO. 10

"Knowingly and Wilfully"

Each count of the Indictment charges, and the Government must prove, that each defendant knowingly and wilfully violated the law.

"Knowingly" means with knowledge, that is voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

An act is done "wilfully" if done voluntarily and intentionally, with specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law. In determining whether a defendant has acted knowingly and wilfully, it is not necessary for the Government to establish that he knew that he was breaking any particular law. Ignorance of the law is no excuse.

Wilful intent may be evidenced not

APPENDIX K

only by statements that are patently false, but by false and untrue statements made with reckless indifference as to whether they are true or false.[1]

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be

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1. United States v. Wilkinson, 460 F.2d 725 (5th Cir. 1972); Ebel v. United States, 364 F.2d 127 (10th Cir. 1966), cert. denied, 385 U.S. 1014 (1967); United States v. Sheiner, 410 United States v. Budzanoski, 462 F.2d 443 (3rd Cir. 1972), cert. denied, 409 U.S. 949 (1972).

inferred from all the surrounding circumstances.[2]

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2. United States v. Kozak, 488 F.2d 1062, 1067 (3rd Cir.), cert. denied, 402 U.S. 996 (1971); United States v. Platt, 182 F.2d 469, 471 (2nd Cir. 1950); United States v. Nance, 502 F.2d 615 (8th Cir. 1974), cert. denied, 420 U.S. 926 (1975); United States v. Fleming, 479 F.2d 56 (10th Cir. 1973); United States v. Lowder, 492 F.2d 953 (4th Cir. 1974), cert. denied, 419 U.S. 1092 (1974); Benchwick v. United States, 297 F.2d 330, 333, n. 5 (9th Cir. 1961).

APPENDIX L
ARGUMENT ON MENTAL ELEMENT

[Rule 30, Transcript 11:4 - 14:4]

THE COURT: Ten. These are definitions pulled right out of--

MR. HAEFETZ: Judge, I have alot of objections. Our defense here obviously, what we are arguing is lack of knowledge and I think the government sort of glosses over and lightens the knowledge burden and I think in the second paragraph, they say, "knowingly means with knowledge". I think we should say actual knowledge.

MR. FRIEDMAN: That is not the law.

MR. GROSS: On false statements, I believe it is the law, that it must be actual knowledge of the falsity of the statement.

MR. HAEFETZ: That is what the case is about, whether they actually knew or didn't know.

THE COURT: What does it mean, if not actual knowledge?

MR. FRIEDMAN: Your Honor, for example,

in a case such as this where you have a conspiracy, they don't have to actually know that a particular act was done. If they entered into a conspiracy and this is in furtherance of the agreement, they don't have to have the actual knowledge of the act that was done at the particular time.

MR. HAEFETZ: What do they have to have knowledge of then?

MR. FRIEDMAN: They have to have knowledge of the conspiracy and to anything that it is an on going conspiracy.

MR. HAEFETZ: That is semantics. They have to have knowledge of the false leases. Either they actually know or they don't know. If they don't know, they are not in, if they do know they are in. You have to have knowledge. You can't talk around that issue. You cannot convict a defendant beyond a reasonable doubt unless he has knowledge and the knowledge here is knowledge of false statements being submitted to the bank. If they can't prove that, they should loose.

APPENDIX L

If they can, they win.

THE COURT: What is with the third paragraph, anything?

MR. GROSS: I don't think we put in issue the question of ignorance of the law, Your Honor.

MR. CONWAY: I can't say I am pleased with that last sentence.

MR. GROSS: I think the last two sentences.

MR. CONWAY: The last two, yes.

MR. GROSS: Simply not in issue.

MR. FRIEDMAN: I think that is clearly the law, Your Honor.

MR. CONWAY: It is the law but it doesn't apply in the case. There are lots of laws.

MR. FRIEDMAN: I think it does apply in this case. You can put up a defense of not knowing what was going on and putting these things in as if--

MR. CONWAY: My defense is ignorance of fact, not of law.

APPENDIX L

MR. GROSS: And Your Honor, referring to the second paragraph, if it is going to go in in some sort of modified form, then mistake, accident or other innocent reason are by no means exclusive. I would certainly want ignorance of the true state of affairs to be one specified matter that is contrary to knowledge.

THE COURT: Alright. I have got both your positions. Are they the only things you have in mind?

MR. HAEFETZ: No. The last paragraph, reckless indifference. I would certainly object to it. I think the question is whether they knew the statements were false.

THE COURT: No, that has always been there. Reckless indifference of the law would give you all kinds of outs. It would give anybody, any defendant--I am concerned with paragraphs, the last and the next to the last in paragraph two.

MR. GROSS: We have problems with the next page which is part of that same instruction.

APPENDIX L

THE COURT: I don't see any problem with that page.

MR. GROSS: I think on the facts of the case, our position is that the circumstantial evidence does not meet the clear unequivocal standard of knowledge.

THE COURT: Where are we talking about now?

MR. GROSS: It would make direct proof necessary.

THE COURT: No. Alright. I will not charge knowledge, but I will take out in paragraph two the last two sentences.

Request number eleven, this is intent.

APPENDIX M

ARGUMENT ON STANDARD OF PROOF

[Rule 30, Transcript 21:16-22]

MR. HAEFETZ: The next page, I think this is really overemphasizing in trying to--I mean the tone of it is to really reduce--sounds like it reduces the government's burden. It is so difficult to prove conspiracy that, let's have a more relaxed standard in proving crime.

THE COURT: I think they did. I think Congress did.

APPENDIX N

CHARGE TO JURY ON RECKLESS INDIFFERENCE

[Transcript 157:20-158:8]

Now, each count of the indictment charges, and the government must prove, that each defendant knowingly and willfully violated the law.

Knowingly means with knowledge, that is voluntarily and intentionally and not because of mistake or accident or other innocent reason.

An act is done willfully if done voluntarily and intentionally with specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law.

Willful intent maybe evidenced, not only by statements that are patently false, but by false and untrue statements made with reckless indifference as to whether they are true or false.

APPENDIX O
CHARGE TO JURY ON ACQUIESCENCE

[Transcript 168:20-169:2]

The mere passive acquiescence of a defendant in the misconduct of another does not, in itself, make that defendant a conspirator. On the other hand, a defendant's acquiescence in the misconduct of another may indicate that defendant's intent to become a party to the conspiracy if you should find that that occurred. See, these are factual situations. As I said before, that is what you should be concerned with.

APPENDIX P
CHARGE TO JURY ON AGENCY

[Transcript 174:1-25]

It is not necessary, however, that the defendant agree to or even know all the details, minor or otherwise, of the crime in order to aid and abet its commission. It is not necessary that a defendant participate in every phase of the criminal activity.

You may not, of course, find a defendant guilty unless you find beyond a

reasonable doubt that every element of the offense as I have defined it in these instructions was committed by some person or persons and that that defendant participated in some way in the commission of the offense.

One who, with the necessary criminal intent, causes a criminal act, is punishable as a principal, even if the act is achieved through the actions of an innocent intermediary.

It is not necessary to prove that the accused personally did every act constituting the offense charged.

As a general rule, whatever any person is legally capable of doing himself, he can do through another or his agent. So, if the acts or conduct of any employee or other agent are knowingly and willfully ordered or directed or willfully authorized or consented to by the accused, then the law holds the accused responsible for such acts or conduct the same as if personally done by the accused.

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18, UNITED STATES CODE

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131—1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Opposition

Office - Supreme Court, U.S.
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No. 81-1081

In the Supreme Court of the United States

OCTOBER TERM, 1981

LUDWIG BRUSCHI AND AUGUST B. JULIANO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Juliano was properly convicted and sentenced on separate counts of making false statements to a federally insured bank where each count involved separate and distinct false statements.

2. Whether the district court properly instructed the jury on the elements of knowledge and intent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 8a-18a) is unpublished.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a-7a) was entered on July 28, 1981. Petitions for rehearing were denied on September 8, 1981 (Pet. App. 2a-3a). Justice Brennan extended the time for filing a petition for a writ of certiorari to December 6, 1981. The petition was filed on Monday, December 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiring to make false statements to a federally insured

bank in applying for a loan, in violation of 18 U.S.C. 371 (Count 1), and making false statements to a federally insured bank in applying for a loan, in violation of 18 U.S.C. 1014. Petitioner Juliano was convicted on five counts of the substantive offense (Counts 2, 5, 6, 7, and 9) and was sentenced to concurrent terms of 18 months' imprisonment on each count. Additionally, he was fined $10,000 on Count 1 and $5,000 on each of the remaining counts. Petitioner Bruschi was convicted on one substantive count (Count 9) and was sentenced to concurrent terms of three years' imprisonment on Count 1 and two years' imprisonment on Count 9 (see I C.A. App. 13a, 15a).[1] The court of appeals affirmed (Pet. App. 8a-18a).

The evidence at trial showed that in the summer of 1975 Juliano was a partner in Vista View, which was formed for the purpose of acquiring and operating a newly constructed three-story office building in Union City, New Jersey. In April 1976 Bruschi joined the partnership (Tr. 30, 75; G. Exh. 146). Juliano acted as managing partner for the venture and was personally involved in overseeing the financial aspects of the operation (II C.A. App. 59, 147, 453-454, 471-473).

The partnership had anticipated that a large portion of the building would be rented to two union organizations. However, the unions never became tenants and the partnership began to experience financial difficulties. As a result of its inability to find tenants, especially for the third floor of the building, the partnership became delinquent in its mortgage payments (Tr. 70, 104, 107, 109-110; G. Exh. 1).

Subsequently, Vista View sought a second mortgage from Lincoln Federal Savings and Loan Association. In

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[1] "C.A. App." refers to the Joint Appendix in the court of appeals. "Tr." refers to the trial transcript. "G. Exh." refers to the government's trial exhibits.

connection with this loan, in December 1976, Vista View submitted to the bank what purported to be a five-year lease agreement executed by "Dental Associates" for the rental of 11,000 square feet on the third floor of the building, at a total annual rent of $90,750 (I C.A. App. 41a-44a; II C.A. App. 779-785). This agreement was never reached between Vista View and any group named "Dental Associates," and the signature of "Dr. Isaak" on the lease was a forgery. In fact, Juliano had negotiated and signed an agreement with Dr. Isaak, not Dental Associates, which provided for the use of 2,000 square feet on the second floor based on a profit-sharing arrangement, not the payment of rent (II C.A. 599-614; G. Exh. 187).

The Lincoln bank approved a $1.7 million mortgage to Vista View on December 23, 1976 and issued a commitment letter (Tr. 240-242). The bank asked for certain additional documents, however, before the money could be disbursed. On February 22, 1977, Vista View submitted a Subordination Agreement between Dental Associates and Vista View, which subordinated the lease to the mortgage approved by the Lincoln bank. This document was signed by Juliano and Dr. "Issak" for Dental Associates.[2] Thereafter, the Lincoln bank issued a second mortgage in the amount of $1.7 million (Tr. 258-268).

The partnership continued to have a cash flow problem and again fell behind in its mortgage payments. During this period Juliano and Bruschi attended numerous meetings in which the continuing financial crisis of the business was discussed along with the major reason for the problem—the inability to find tenants for the third floor of the building (II C.A. App. 405-406, 930, 936, 945-946, 1003-1009, 1035-1047).

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[2]On the Subordination Agreement the signature appeared to be spelled "Issak" not Isaak (I C.A. App. 46a; II C.A. App. 615).

In December 1977 the partnership applied for another loan from the Columbia Savings and Loan Association. In connection with this loan, two ten-year lease agreements were submitted to the bank, one for Dental Associates and another for Dr. Robert W. Peterson. These leases reflected that Dental Associates had now agreed to rent 11,000 square feet on the third floor at an annual rent of $110,000, and that Dr. Peterson had rented 4,000 square feet on the third floor at an annual rent of $40,000. In fact, these agreements had not been entered into. They had been prepared and submitted to the bank in December 1977 by one Basil Pennise, who had been hired by Juliano to maintain Vista View's books. Pennise submitted these documents after informing both petitioners of his intention to extend the time period of the fictitious leases submitted to the Lincoln bank, and to increase their rents (I C.A. App. 47a-57a; II C.A. App. 1009-1015, 1034, 1047; Tr. 1356, 1360-1361). The third floor had not then been rented, and even though Dr. Peterson was renting 1200 square feet on the second floor he had not begun to pay rent in January 1978. Both petitioners attended the mortgage closing in January 1978 and represented to the bank that the leases were then in full force and effect. Accordingly, the bank made a $2.1 million loan to Vista View (Tr. 878, 1404, 1406, 1416, 1528-1530, 1618, 1633).

ARGUMENT

1. Petitioners contend (Pet. 14-20) that the indictment improperly charged Juliano with multiple counts for commission of the same offense, and that his subsequent conviction and sentencing on five substantive counts imposed multiple punishments in violation of the Double Jeopardy Clause. They argue that there can be only one substantive charge under 18 U.S.C. 1014 with respect to each separate loan application. The court of appeals correctly rejected this claim (Pet. App. 16a):

> [S]ection 1014's proscription against knowingly making "*any* false statement or report" (emphasis added) indicates that Congress intended to treat each such misrepresentation separately, and did not intend that all such statements or reports concerning a single transaction must be a single crime.

Cf. *United States* v. *Zwego*, 657 F. 2d 248 (10th Cir. 1981), cert. denied, No. 81-877 (Jan. 25, 1982).[3]

Moreover, in this case it is even difficult to argue that the multiple punishments imposed on Juliano were for the same transaction. Count 2 was based on the fraudulent Dental Associates lease submitted to the Lincoln bank in December 1976. Count 5 was based on the Subordination Agreement submitted to the Lincoln bank in February 1977, after it had approved the mortgage and requested further assurances before the funds could be disbursed. The Subordination Agreement then represented that Dental Associates had agreed that the lease would be subordinate to the mortgage. Thus two false representations were made to the Lincoln bank in connection with two separate business transactions that took place months apart.

The false representations in connection with the Columbia bank loan were similarly distinct. Although both of the documents represented in Counts 6 and 7 were submitted to the Columbia bank in December 2, 1977, Count 6 was based

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[3] *United States* v. *Canas*, 595 F. 2d 73 (1st Cir. 1979), relied on by petitioners, does not conflict with the decision below. *Canas* did not involve any issue of double jeopardy. On the contrary, the question there was whether the government could properly join several false documents in a single count under Section 1014. The First Circuit simply held that it could, at least where "the documents were interrelated and in the absence of any one of them, the 'false statement or report' was incomplete." 595 F. 2d at 78. The court of appeals in this case expressly stated that it was not deciding "whether the Government may, if it chooses, cover all the false statements in a single count of the indictment" (Pet. App. 17a).

on a new fraudulent lease purportedly entered into by Dental Associates on October 20, 1976, while Count 7 was based on a fraudulent lease supposedly executed by Dr. Peterson on November 4, 1976 (I C.A. App. 47a, 52a). The bank later learned that the third floor of the building, covered by these leases, was unoccupied. Count 9 was based on the subsequent representation by the petitioners, at the closing in January 1978, that the third floor leases were nonetheless in effect, and that Dental Associates and Dr. Peterson were paying rent. Unless Section 1014 is understood to forbid each distinct false statement, it would provide no additional deterrence for follow-up misrepresentations like those that in this case finally convinced the two banks to make improvident loans.[4]

2. Petitioners also claim (Pet. 21-23) that the district court's instructions to the jury improperly permitted them to be convicted of making false statements to a federally insured bank even though they had no actual knowledge of the falsity of the statements. Specifically, they maintain that the instruction concerning "reckless indifference" allowed the jury to find them guilty because they had been negligent in signing documents involving business transactions, without any knowledge of their truth or falsity. This contention is belied by the record.

When viewed in its entirety, the district court's charge correctly instructed the jury on the element of knowledge. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). In its

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[4]For that reason *United States* v. *Sue*, 586 F. 2d 70 (8th Cir. 1978), also cited by petitioners, is quite unlike this case. *Sue* held only that "making false statements in different paragraphs of a single security agreement" constituted a single offense. *Id.* at 71. The false statements, which concerned farm equipment held by Sue, were that the equipment (1) was not subject to any liens, and (2) was free from filed financing statements. See also *United States* v. *Sahley*, 526 F. 2d 913 (5th Cir. 1976).

final charge to the jury, the district court gave the following instruction (Pet. App. 11a-13a & n.1):

> Now, each count of the indictment charges, and the government must prove, that each defendant knowingly and willfully violated the law.
>
> Knowingly means with knowledge, that is voluntarily and intentionally and not because of mistake or accident or other innocent reason.
>
> * * * * *
>
> Willful intent may be evidenced, not only by statements that are patently false, but by false and untrue statements made with reckless indifference as to whether they are true or false.
>
> Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.
>
> * * * * *
>
> A statement is false or fictitious if untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is fraudulent if known to be untrue or made or caused to be made with the intent to deceive the Federal Savings and Loan Association to whom submitted.

> The word, false, must be considered together with the words, knowingly and willfully. An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law. The word, knowingly, is added in order to insure that no one would be convicted [who] made or caused to be made a statement or representation which was false because of mistake or accident or other innocent reason.

This charge was a correct statement of the law on the issue of knowledge. The district court stressed, on three occasions, that petitioners could not be convicted if the statements were made as a result of a "mistake or accident or other innocent reason." In fact, these instructions were consistent with petitioners' defense theory that the representations were made and the documents were signed as a result of a mistake or some other innocent reason. The court's instructions clearly conveyed that the jury could not convict unless it found that the statements or representations were made voluntarily and intentionally with knowledge of their falsity.

Moreover, it is well settled that a finding of guilty knowledge may be based on "conscious avoidance" of the truth. *United States* v. *Hanlon*, 548 F. 2d 1096, 1100-1101 (2d Cir. 1977); *United States* v. *Bernstein*, 533 F. 2d 775, 796-798 (2d Cir.), cert. denied, 429 U.S. 998 (1976); *United States* v. *Jewell*, 532 F. 2d 697, 699-703 (9th Cir.), cert. denied, 426 U.S. 951 (1976). See also *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969). A defendant may not escape criminal liability by showing that he closed his eyes to what was going on about him. *United States* v. *Hanlon*, *supra*, 548 F. 2d at 1101. Thus the instruction correctly

indicated that the jury could interpret petitioners' signatures on fraudulent documents representing major business transactions as circumstantial evidence of their guilty knowledge.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
Attorney

FEBRUARY 1982

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[5] *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), is inapposite. This Court there rejected the contention that the Sherman Act should be read to impose a standard of strict liability for criminal antitrust offenses. With regard to the requisite state of mind, though, the Court concluded that it would be "sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow." *Id.* at 444. That is no different from the instruction given the jury in this case. Moreover, the Court added that "an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted." *Id.* at 446.

Petitioner's Reply Brief

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No. 81-1081

In The

Supreme Court of the United States

October Term, 1981

LUDWIG BRUSCHI,
DR. AUGUST B. JULIANO,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY
TO THE BRIEF IN OPPOSITION TO CERTIORARI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO THE BRIEF IN OPPOSITION

In opposing certiorari, the government does not dispute that the two questions presented are appropriate for consideration by this Court. Neither does it take issue with our review of the facts. A Reply nonetheless is warranted, in order to explore the rationales underlying the Brief in Opposition (hereafter, "Opp.").

Before turning to the government's position on the law, we must correct a factual misstatement which, had it been accurate, might render this case an inappropriate vehicle for resolving one of the questions presented. Specifically, when discussing the Columbia mortgage application (which included two revised leases forged by accountant Pinnese), the government stated (Opp. 4):

> Pennise submitted these documents after informing both petitioners of his intention to extend the time period of the fictitious leases [previously] submitted to the Lincoln bank, and to increase their rents.

In fact, there was only one forged lease submitted to Lincoln; Dr. Peterson had signed a valid lease. More importantly, Pennise, who was working under the direction of Vista View's attorney (DiBiasi), testified only that he informed petitioners about the proposed revisions to the leases; Pennise most certainly did not "inform . . . petitioners" that any prior lease was "fictitious" -- or that he was about to forge tenants' signatures to revised leases which would later be at issue on the Columbia counts.

If there were even slight evidence in the record bringing home to petitioners the fact that a lease had been forged,[1] we would not have raised the second question presented. And if Pinnese had actually informed either petitioner that any lease

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1. Likewise, the record contains no evidence that petitioners actively concealed the truth. The government's contrary claim (Opp. 6, emphasis added) that Columbia "later learned that the third floor of the building . . . was unoccupied" is false. A stated purpose for this refinancing had been to finish the third floor.

was fictitious, the United States would have said so clearly and unequivocally.

1. This Court Should Review the First Question

The first question raised in our Petition asks this Court to ascertain the proper unit of prosecution in § 1014 cases. The answer to that question lies in the intent of Congress.

Did Congress enact § 1014 in order to protect the process by which lending institutions decide to grant credit? If so, § 1014 focuses on the credit transaction, as at least four circuits have held. United States v. Zwego, 657 F.2d 248, 251 (10th Cir. 1981), cert. denied, No. 81-877 (Jan. 25, 1982)(many false statements when applying for two separate loans constitute two § 1014 violations); United States v. Canas, 595 F.2d 73 (1st Cir. 1979); United States v. Sue, 586 F.2d 70 (8th Cir. 1978); United States v. Sahley, 526 F.2d 913 (5th Cir 1976). Or, as the Third Circuit

held, did Congress intend to punish separately each and every false statement made to a bank, even if only one credit application is involved?

A. The government urges that the Third Circuit's holding is correct. It contends that there is a need to create "additional deterrence for follow-up misrepresentations" (Opp. 6). The government cites to no authority indicating that Congress so reasoned. Absent such an indication, the rule of lenity normally will be applied. Bell v. United States, 349 U.S. 81 (1955).

B. Even if, as the government asserts, the first question was correctly decided below, the fact remains that the circuits are in direct conflict. That conflict is exemplified by Canas, supra.

In Canas, the operative facts are identical to those at bar. Different documents, containing different false statements, were submitted at different times, in order to procure each individual extension of credit. Each § 1014 count for

which Canas was prosecuted involved more than one false statement but only one loan application. Canas complained that each false statement must be charged in a separate and distinct count, as the government chose to do petitioners' case (four § 1014 counts for each application).

The First Circuit found persuasive the government's response (595 F.2d at 78-79, emphasis added):

> The Government argues that . . . each document was a necessary part of the loan application and each was required before the Bank would make the loan. In other words, the documents were interrelated and in the absence of any one of them, the "false statement or report" was incomplete. . . .
>
> [W]e find merit in the Government's position. Only one loan was involved. While several false statements were submitted, all were required before the loan could be approved. The focus of the offense is influencing the action of the bank. . . .
>
> Congress was concerned with proscribing the influencing of the action of a bank in an application for a loan, and each required statement was a part of achieving that result and <u>not a separate and distinct offense</u>.

The government now sees no inconsistency in its First and Third Circuit positions, and no conflict between those circuits. Canas, it argues, "did not involve any issue of double jeopardy" (Opp. 5 n.3). That begs the question by looking at the label for the vice instead of looking at its source and substance.

In petitioners' case the asserted vice is multiplicity (charging a single offense in more than one count), whereas in Canas it was duplicity (charging more than one offense in a single count). Multiplicity is condemned because it directly violates the double jeopardy clause; duplicity is condemned because it violates F.R.Crim.P. 8(a). That Rule, which mandates "a separate count for each offense," promotes the fair trial interest in defending against a specific accusation as well as the double jeopardy interest in being able to plead prior conviction or acquittal to a later indictment.

Although different labels have been given to the asserted vices in Canas and the case at bar, the proper disposition of both cases has to turn upon a single issue of statutory construction, namely, the required unit for framing § 1014 accusations. The Third Circuit reached one result, and the First Circuit reached its opposite.

Although each court adopted the position pressed upon it by the government, one of them had to be wrong. The Solicitor General has not come to grips with this unseemly situation. The time is ripe for this Court to do so.

C. By attempting to straddle both sides of the fence, the government is really claiming -- as it explicitly claimed below -- that the prosecution retains discretion to charge each false statement in a separate count or to lump such statements together in a single § 1014 count. That claim runs roughshod over the doctrine of Separation of Powers.

Our Constitution reserves to Congress the exclusive power to define federal crimes. While discretion is vested in the Executive to decide which alleged crimes to prosecute, in exercising that discretion the Executive simply cannot redefine the crimes. That is precisely why this Court has so often directed its attention to the proper unit of prosecution under various statutes,[2] as we pointed out in the Petition, 14 & n.6.

D. The government errs in suggesting that only petitioner Juliano raises the first question. While that question is dispositive of a double jeopardy claim unique to him (for he received separate fines on two different Lincoln mortgage counts and on three different Columbia mortgage counts), it also involves both petitioners' rights to a fair trial.

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2. If the law vests discretion in the prosecutor to determine what acts constitute a single offense, as the Solicitor General intimates (Opp. 5 n.3), then time and time again certiorari has been improvidently granted to resolve unit-of-prosecution questions.

As we pointed out in our Petition, 15-16, prolix pleading tends to paint each accused as an habitual offender, thereby predisposing jurors to find guilt. And as to petitioner Bruschi, who has only a grammar school education, there was no competent evidence that his understanding of Vista View's financing extended beyond a generalized appreciation of the need for more money in order to finish off the third floor. Indeed, the government implicitly acknowledges (Opp. 2) that Mr. Bruschi, unlike Dr. Juliano, was not involved in Vista View's financial decisions.

In these circumstances, any unlawful multiplication of the charges against Mr. Bruschi was bound to bolster a case which was notable for its paucity of hard evidence.

2. This Court Should Review the Second Question

The second question presented asks whether "reckless indifference" to the truth or falsity of a statement satisfies § 1014's required mental element.

A. To assist this Court in determining the precise contours of this question, we specified that "feigned ignorance" should be equated with actual knowledge. We also pointed out that the record contains no indication petitioners had deliberately closed their eyes to the underlying forgeries, and that the government had never claimed otherwise (Pet. 22 n.8).

The Brief in Opposition concludes with a discussion about studied ignorance (Opp. 8-9), which lightly glosses over the difference between a simple failure to investigate and a conscious effort to avoid learning the truth. Specifically, the government asserts that by putting their "signatures on fraudulent documents representing major

business transactions" petitioners "closed [their] eyes to what was going on about [them]." Id.

The documents in question were prepared under the supervision of an attorney. No false statements were "apparent on the face" of those documents. United States v. Glantzman, 447 F.2d 199, 201 (3d Cir. 1971). And the origins of each false statement lay in forgeries by others, rather than in data first supplied by petitioners. Cf. United States v. Goberman, 458 F.2d 226 (3d Cir. 1972) (feigned ignorance doctrine applies where defendant provided false income tax returns from which his accountant prepared loan application).

The government's analysis in this Court fails to state why petitioners should have known that the documents were fraudulent. If that question is irrelevant -- and we emphasize that the record provides no substantial basis for imputing knowledge of the forgeries to petitioners -- then there is really no difference between a failure to

investigate the truth and pretending not to know the truth; mere negligence equates with feigned ignorance.

To gloss over the distinction between negligence and conscious avoidance inevitably interjects the doctrine of respondeat superior -- a term which the government assiduously avoids -- into the law of felony. Certiorari is therefore warranted to determine whether the principals in a business venture can be held liable in felony for their agents' unauthorized forgeries and related false statements.

B. In arguing for the first time that feigned ignorance is a viable theory for sustaining petitioners' guilt, the government disregards a long line of cases holding that a conviction may not be affirmed on a theory which had not been pressed at trial. E.g., Eaton v. City of Tulsa, 416 U.S. 697 (1974)(per curiam); Cole v. Arkansas, 333 U.S. 196 (1948).

Moreover, the government misreads the cases upon which it relies. For example, in United States v. Hanlon, 548 F.2d 1096 (2d Cir. 1977), which is cited for the proposition that criminal liability cannot be escaped by closing one's eyes (Opp. 8), the Second Circuit criticized the trial judge for giving no definition or qualification to the term "reckless" (548 F.2d at 1001). The Hanlon Court went on to state, "[S]hould trial courts continue to employ this disfavored language, we will not hesitate to take appropriate corrective measures" (548 F.2d at 1002). Also see United States v. Sarantos, 455 F.2d 877, 882 (2d Cir. 1972) ("reckless disregard" must be defined as "conscious purpose to avoid the truth"); United States v. Squires, 440 F.2d 859, 864 n.14 (2d Cir. 1971) (same)

At petitioners' trial, the district judge offered no explanation whatsoever of the term "reckless indifference;" he left the jury free to determine without judicial guidance whether that

key term meant conscious avoidance or mere negligence. Cf. Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966) (juries must not be left to decide crucial issues "on their own notion of what the law should be").

The Third Circuit's approval of a bald "reckless indifference" instruction therefore creates a direct conflict with the Second Circuit. Accordingly, certiorari is warranted to determine whether a trial judge must charge that reckless conduct satisfies the mental element in false statements cases only when it amounts to conscious avoidance of the truth.

C. The government also argues (Opp. 6) that the instant reckless indifference instruction was inconsequential under the test of Cupp v. Naughton, 414 U.S. 141 (1973). Under that test, petitioners must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process" (414 U.S. at

147). Here, the verdicts show that the jurors viewed a person's signature on a document as the sine qua non of his knowledge that the contents of that document were false.[3] The government virtually concedes this (Opp. 9).

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3. The jury found each petitioner guilty of a substantive § 1014 count if and only if his signature appeared on the document in question. The record lends strong support to the view that petitioners acted negligently by failing to investigate before signing, whereas it lends virtually no support to the government's contention (Opp. 9) that the signatures evidence conscious avoidance of the truth. A review of the proofs will make this clear.

On the Lincoln mortgage counts, Dr. Juliano signed the first Dental Associates lease in blank (Count 2), before Dr. Isaak's signature had been forged to it. Dr. Juliano signed at his office and mailed to Vista View's attorney (DiBiasi) a routine technical document subordinating rent receipts to the Lincoln mortgage (Count 5). DiBiasi, whom Pinnese says admitted forging the first Dental Associates lease (Tr. 1028; see 15a & n.2), later mailed that document to the closing attorney (Tr. 803). Thus, contrary to the government's implication (Opp. 3 & n.2), the only pertinent evidence indicates that Isaak's signature was forged to the subordination agreement by DiBiasi after Juliano had signed it.

[continued on page 16]

If that be the test of § 1014 guilt, then the statutory term "knowingly" is deprived of its logical meaning. Knowingly transmitting to the bank a statement which happens to be false would satisfy § 1014's mental element; knowledge of the

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[Note 3, continued]

On the Columbia mortgage counts, Pinnese, who forged Dr. Isaak's and Dr. Peterson's names to the revised leases (Counts 6 and 7), had signed Dr. Juliano's name to those documents after receiving telephone authorization to do so. Later, at the Columbia closing, Dr. Juliano signed a technical document assigning to that bank Vista View's rent receipts (Count 9). This was one of many documents which were briefly reviewed at that ceremony, and it was the only document in issue which Mr. Bruschi had signed. Accordingly Count 9 was the only substantive count for which he was convicted.

Notably, there was no evidence from which a rational jury could have concluded, beyond a reasonable doubt, that either petitioner had actual knowledge of the underlying lease forgeries. Neither petitioner prepared or supervised the preparation of any of these documents. Neither petitioner forged, requested, authorized, or even acquiesced in, the forgery of the leases. Neither petitioner procured or negotiated the mortgages; in each instance, that was done by an attorney. And it bears reiterating that the theory upon which the prosecution went forward was keyed to those forgeries.

statement's falsity is wholly irrelevant. Strict criminal liability is thereby imposed under the theory of respondeat superior.

No court has explicitly adopted such an approach to a false statements statute. Yet that approach is implicit in the instant jury's decision to treat signatures as the sine qua non of the requisite knowledge. The jury's reasoning cannot be explained except by reference to the "reckless indifference" instruction.

Clearly, therefore, the ailing instruction had a dispositive impact upon the jury.[4] Accordingly, petitioners easily satisfy the Cupp test.

---

4. The government argues that the ailing instruction was cured by that portion of the charge which exonerated false statements "made as a result of a 'mistake or accident or other innocent reason'" (Opp. 8). That boilerplate language in no way clarified the fatal vagueness of the "reckless indifference" instruction, for mistake and accident were not issues in this case, and "other innocent reason" has no less vague and uncertain a meaning than "reckless indifference."

[continued on page 18]

D. Finally, the government takes exception (Opp. 9 n.5) to our contention that the decision below conflicts with the holding in United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978), that "the concepts of recklessness and negligence have no place" in felonies where knowledge must be proven. The government would limit Gypsum Co. to Sherman Act cases, thereby rendering it "inapposite" (Opp. 9 n.5) to the case at bar.

That narrow reading of Gypsum Co. seems strained, since this Court's analysis was not limited to antitrust cases. On the contrary, the Gypsum Co. survey (438 U.S. at 442-45) touched upon the Model Penal Code and crimes of theft, e.g., Morissette v. United States, 342 U.S. 246 (1952).

[Note 4, continued]

Moreover, petitioners had specifically requested an instruction to the jury that "ignorance of the true state of affairs" (55a) -- which was the central trial issue -- was an "innocent reason" and therefore a complete defense. The district judge refused to charge that language, and thereby passed up an opportunity to clarify the meaning of recklessness.

In any event, the mental elements are crucial in most federal crimes. The reach of the Gypsum holding is therefore an issue which, if not quickly settled, will surely permeate future litigation.[5] Accordingly, certiorari should be granted in order to make clear whether the cited Gypsum holding is limited to Sherman Act cases.

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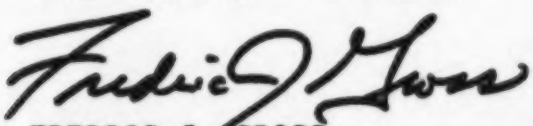
5. We fail to understand the logic of the government's assertion (Opp. 9 n.5) that Gypsum's "conduct . . . 'undertaken with knowledge that the proscribed effects would most likely follow' . . . is no different from the [reckless indifference] instruction given the jury in this case." It is well settled that § 1014 proscribes the intentional making of false statements to obtain credit, rather than the effects which most likely would follow, namely, the unwarranted granting of credit. See, e.g., Kay v. United States, 303 U.S. 1 (1938). Hence, "knowledge that the proscribed effects would most likely follow" simply makes no sense in the context of a false statements prosecution.

CONCLUSION

In attempting to demonstrate that this Court should not give plenary consideration to the two questions we presented, the government has really highlighted the confusion and inconsistency which is evident in the lower courts. At bottom, the Brief in Opposition does not seriously dispute the suitability of this case as a vehicle for settling two unresolved and important issues in the construction of § 1014. Instead, it points up the importance of questions which are subsidiary to those set out in our Petition.

For these reasons, together with those originally advanced, certiorari should be granted.

Respectfully submitted,



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